— an attitude demanding new and broader powers. But the giving of mere transitory amusement or sense satisfaction, involving no further benefit to citizens or state, would seem hardly governmental in character. However, where amusement carries with it possibilities of education, and of greater health and morality, the problem raised is quite a different one. It would not be surprising if, in the near future, just such expenditures as those refused by the Ohio court, when kept in the limits of reasonable economy, should be held within the functions of government which the state either expressly or impliedly delegates to the municipality.

INTOXICATION AND INSANITY AS DEFENSES IN BILLS AND NOTES. — Historically, mental incompetency was at first considered a complete defense in the law of consensual agreements.[1] Since the party could not understand the nature of the transaction, the possibility of an *animus contrahendi* was by hypothesis negatived.[2] On this ground a recent decision allowed the defense of intoxication by an accommodation comaker against a holder in due course. *Green* v. *Gunsten*, 142 N. W. 261 (Wis.). The usual modern view, however, arguing from the analogy to infancy, seems to treat contracts and sales by mental incompetents as merely voidable.[3] This permitting of subsequent ratification is a departure, in theory at least, from the old notion that the mental disability prevented the formation of any contract from the outset. This reasoning was still further developed by the holding of a modern English court that mental incapacity is no defense where the other party acted *bond fide* and without notice.[4] Such a view is in accord with the present tendency to test the validity of the contract, not by the actual *animus contrahendi*, but by the reasonable impression conveyed to the promisee.[5] And the various limitations imposed by different courts on the right of the mental incompetent to avoid seem satisfactorily explainable only on this ground.

If then mental disability is a defense not because of any inherent defect in the contract, but because the law gives immunity under certain circumstances, the only considerations would seem to be those of fairness and policy. Now aside from express contract, where necessaries are furnished to a person *non compos mentis*, a recovery may be had in quasi-contract.[6] Although the liability is not founded on contract but is implied in law, it has been said that a *bonâ fide* purchaser of a negotiable instrument given for necessaries may recover for their value against the insane maker.[7] Fairness and policy argue for this result. Yet to

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[1] Sentance *v.* Poole, 3 C. & P. 1; Dexter *v.* Hall, 15 Wall. (U. S.) 9; Yates *v.* Boen, 2 Str. 1104.

[2] A peculiar doctrine seems to have existed at one time that a party could not be heard to stultify himself by pleading his lunacy. Beverley's Case, 2 Coke 568.

[3] Wolcott *v.* Conn. G. L. I. Co., 137 Mich. 309, 100 N. W. 569; Arnold *v.* Richmond Iron Works, 1 Gray 434; Matthews *v.* Baxter, L. R. 8 Ex. 132.

[4] Imperial Loan Co. *v.* Stone, [1892] 1 Q. B. 599.

[5] See WILLISTON, SALES, § 33.

[6] Baxter *v.* Portsmouth, 5 B. & C. 170; Waldron *v.* Davis, 70 N. J. L. 788, 58 Atl. 293.

[7] Hosler *v.* Beard, 54 Oh. 398, 403, 43 N. E. 1040, 1042. See Earle *v.* Reed, 10

allow a holder, relying solely on his title to the note, to recover in quasi-contract seems clearly anomalous. The doctrine, however, might be considered as simply making the value of the necessaries a limit below which the incompetent, in asserting his defense, may not go. Such a partial defense would at first glance seem exceptional. But the defense is neither an equitable plea, since it is available against *bonâ fide* purchasers, nor a denial, since it admits the formation of a contract. It may, however, be explained as a defensive procedural bar to enforcement, like the statute of limitations, available as to the excess of the contract liability over the value received. On this basis the plea would be equally applicable when the instrument is not given for necessaries. This view makes possible a consistent theory to explain the various decisions and would seem correct on public policy. The insane deserve protection, and a fair limitation is found in making the estate liable for the full value of the consideration actually received.

Drunkenness, where the negotiable instrument is held by a *bonâ fide* purchaser, may be distinguished. Here the signer has voluntarily put himself into a condition in which foolish business acts are likely. To permit him to throw the loss occasioned by his own recklessness on an innocent purchaser for value would be unfair. As it is no longer a question of distributing the loss between two innocent parties, the defense should not be allowed where there is no fraud or unfair conduct on the part of the holder.

What construction will ultimately be put on the somewhat ambiguous provision in the Negotiable Instruments Law as to defenses available against holders in due course is uncertain.[8] The view suggested, however, makes incapacity neither an obstacle to the creation of a negotiable instrument nor an equitable plea, but offers a bar to enforcement, like the plea of the statute of limitations. And, as the act can hardly contemplate abrogating the statute of limitations, similarly incompetency, considered as a purely procedural defense, should be outside the meaning of the act.

AVOIDING SERVICE OF JUDICIAL MANDATES AS CRIMINAL CONTEMPT. — The frequent avoidance of service of judicial process by witnesses and defendants and the lax public attitude toward such practices makes of practical importance the question how far criminal such avoidance is or how far improper it is for a lawyer to inspire such conduct. In general any act which directly obstructs the course of justice is punishable as a misdemeanor or as contempt of court.[1] Thus if a subpœna has been

Met. 387; Dubose *v.* Wheddon, 4 McC. (S. C.) 221; Haine *v.* Tarrant, 2 Hill (S. C.) 400; Bradley *v.* Pratt, 23 Vt. 378.

[8] NEGOTIABLE INSTRUMENTS LAW, § 57: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., p. 65. See 50 Am. L. Reg. N. S. 471, 489.

[1] Rex *v.* Tibbits, [1902] 1 K. B. 77; Skipworth's Case, L. R. 9 Q. B. 230; Globe Newspaper Co. *v.* Commonwealth, 188 Mass. 449, 74 N. E. 682.